IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.421 OF 1994

1.Mohammed Sultan Mohammed
Yasin, Age 42 yrs.
Occ. - Weaver ..
2.Mohammed Salim Mohammed
Sultan, Age 24 yrs.
Occ. Weaver ..
3.Mohammed Naim Mohammed
Sultan, Age 22 yrs.
Occ. Weaver ..
4.Altaf Ahmmad Sultan
Age 19 yrs.
Occ. Weaver ..
5.Muzammil Mohammed Sultan,
Age 10 yrs. ..
6.Irfan Mohammed Sultan
Age 8 yrs. ..
7.Imran Mohammed Sultan,
Age 6 yrs. ..
Petitioner nos.5 to 7 are
minors and are residing
at CTS No.694 Islampura,
Ward Malegaon, Dist.Nasik
through Guardian Sakina
Mohammed Sultan Occ.Household .. Petitioners

Vs.

1.Mohammed Nurani Mohammed
Age 49 yrs. Occ. Weaver
694, Islampura Ward,
Malegaon. ..
2.Abdul Majid Mohd. Yasin
Age 57 yrs. Occ. Weaver
r/o 57, Nawa Islampura,
Malegaon, Dist.Nasik ..
3.Smt.Batul Bashir
Age 55 yrs, Occ.Household
through Mohd.Bashir r/o
Universal Sayging Near
S.No.24(A), Plot No.19
Behind Petrol Pump,
Malegaon. ..
4.Smt.Jabunnissa Abdul Gaffar
Age 52 yrs. Occ.Household
r/o House No.1165, Sultanpura
Malegaon ..
5.Samsunnissa Maheboob Ali
Age 50 yrs, Occ. Household

r/o sunnipuri, 2nd lane, Ekbal
Dabi's front side, Malegaon ..
6.Ekbal Ahmad Abdul Hamid
Age 50 yrs. Occ.Business
r/o Islampura, Malegaon ..
7.Khurshidunnissa Ekbal Ahmad
Age 44 yrs. Occ. Business ..
8.Ejaj Ahmad Ekbal Ahmad
Age 27 yrs. Occ.Service ..
9.Said Parvej Ekbal
Age 19 yrs. Occ.Business ..
10.Jahid Latif Ekbal Ahmad
Age 19 yrs.Occ.Business
Nos.6 to 10 are r/o H.No.688
Islampura, Ward, Malegaon .. Respondents.

Mr.R.K.Daruwalla and Mr.A.N.Mulla for the petitioners.
Mr.G.S.Hiranandani i/b Mr.C.G.Gavnekar for respondent no.1.

CORAM : D.B.BHOSALE, J.

DATED : 1ST SEPTEMBER, 2005

ORAL JUDGMENT:

. This petition is directed against the judgment and order dated 23.8.1993 passed by the Civil Judge, Senior Division, Malegaon on the application filed by the petitioners, who are original defendant nos.1 to 7, under Order 18 Rule 2 of the Code of Civil Procedure by which the prayer of the petitioners seeking direction to defendant nos.8 to 11 to produce their evidence in preference to all other defendants including the petitioners has been rejected. Such prayer was made in view of the fact that defendant nos.8 to 11

have supported the case of the plaintiffs insofar as the questioned gift deed dated 27th May, 1988, executed by Hazarabi in favour of the petitioners, is concerned and prayed for decreeing the suit for partition and separate possession of their share in the properties mentioned in paragraph 1 of the suit.

2. Mr.Mulla, learned counsel for the petitioners assailed the impugned order solely on the ground that the case of the plaintiffs has been supported by defendant nos.8 to 11 in whole and, therefore, they should address the court and produce their evidence in preference to other defendants who do not support the plaintiffs' case. In support of this submission he placed reliance upon the judgment in **Shah Hiralal Himatlal and Others V. M.G.Pathak and Others AIR 1964 GUJARAT 26**.

3. On the other hand Mr.Hiranandani, learned counsel for the respondents submitted that though defendant nos.8 to 11 have prayed for decreeing the suit, as prayed for by the plaintiffs, they have independently stated in their written statement as to why the gift deed cannot be acted upon and how that is affecting their right in the property. He

further submitted that the provisions of Order 18 and in particular rule 2 thereof do not give right to the defendant to insist for such directions in a suit for partition and separate possession of all the properties in the suit.

4. I have perused the plaint and in particular prayers therein. It consists of several prayers including the declaration in respect of the gift deed dated 27.5.1988 and the sale deed dated 26.5.1988. The plaintiffs have also prayed for partition and separate possession of 2/9th share in the suit properties. Admittedly, the plaintiffs and defendant nos.1 to 11 are the members of one and the same family. The deceased Hajrabai was mother of plaintiffs and defendant nos.1, 8 to 11. She died on 30.5.1988. According to the plaintiff she was 90 years old when she died and was not keeping well. Physically and mentally she was not fit to execute the gift deed and the sale deed. The defendant nos.1 to 7 and 11 to 16 got them executed by fraud and that they are not binding on them. It appears that the suit has been essentially filed for partition and separate possession and that has been supported by some of the defendants claiming their share and possession in all the suit properties. It is against this

backdrop I would like to consider the submission of the learned counsel for the petitioners.

5. Order 18 of CPC deals with hearing of the suit and examination of witnesses and Rule 1 and 2 thereof in particular deal with the right to begin and production of evidence. A plain reading of Rule 1 would show that the plaintiff has the right to begin since he has to prove his claim by positive proof, because the Court has to see whether or not there is proof of claim before enquiring into the truth or otherwise of the defence. This rule confers right on the defendant also to begin if he admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by him, the plaintiff is not entitled to any part of relief which he seeks. The right to begin the case is, thus, based on burden of proof. Under Rule 2(1), on the date fixed for hearing of the suit "the party" having the right to begin requires to state his case and produce his evidence in support of the issues which he is bound to prove. Sub-rule 2 of rule 2 provides that "other party" shall then state his claim and produce his evidence, if any, and may then address the court jointly on the whole case. Sub-rule 3 of Rule 3 provides that "the party"

beginning may reply jointly on the whole case. A conjoint reading of Rule 1 and 2 would, thus, show that the plaintiff has the right to begin and at the same time the right to begin is also conferred on the defendant if he admits the facts in his written statement as contemplated by rule 1. The plaintiff in a given case has the right to make application for order directing the defendant to begin his case if in the pleading he admits the facts as contemplated in rule 1. Such application, however, needs to be filed on the very first day fixed for hearing of the suit or on any other date to which the hearing is adjourned as provided in rule 2. The plaintiff and the defendant thus can exercise the right, conferred by Rule 1 and 2 of Order 18, against each other seeking such direction from the court. The Court is expected to move on such application keeping in view the pleadings of the parties.

6. The question, that falls for my consideration is, if there are more defendants whether some defendants have the right to make an application for order directing the other defendant to produce their evidence first if such defendants admit the facts in their written statement as contemplated by Rule 1. The question as to which

of the defendants should begin though has not been specifically dealt with in Rule 1 or 2 of Order 18, in my opinion, the same analogy would apply to the defendants interse. Ordinarily, the defendant who opposes a claim of the plaintiff in whole will have such right against the defendant who supports the plaintiff in whole or in part. In a given case, the defendant who opposes the claim of plaintiff in whole, therefore, may be justified in seeking direction to the defendant, who supports the plaintiff in whole or in part, to begin and produce his evidence in support of the issues which the plaintiff is bound to prove. The court will have to deal with such questions on the basis of the pleadings in each case.

7. Insofar as the instant suit is concerned, as observed earlier this is a clear suit of partition between the members of one and the same family claiming their share in several properties and, therefore, I am of the considered opinion that the petitioners-defendants have no right to make prayer, as made by them in the application under Order 18 Rule 2. None of the parties in the suit for partition can be said to have the claim against other. This is not adversary litigation and, thereore, the question of supporting the plaintiff

or opposing the plaintiff in part or whole does not arise in the suit for partition. Every member of the family is entitled for his share in accordance with law. In short, in a suit where there is a prayer for partition and there are more than one defendant admission by some will not shift the burden. No such application can be entertained. In this view of the matter the contention of the learned counsel for the petitioners that since defendant nos.8 to 11 support the claim of the plaintiffs be directed to produce their evidence in preference to other defendants must be rejected. In the circumstances the impugned order cannot be faulted. The writ petition, therefore, deserves to be dismissed. Order accordingly.

(D.B.Bhosale, J.)